

9-1-1991

Abortion Law Reform: The Nexus Between Abortion and the Role of Women in the German Democratic Republic and the Federal Republic of Germany

Elizabeth J. Kapo

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>



Part of the [Comparative and Foreign Law Commons](#), [Health Law and Policy Commons](#), and the [International Law Commons](#)

Recommended Citation

Kapo, Elizabeth J. (1991) "Abortion Law Reform: The Nexus Between Abortion and the Role of Women in the German Democratic Republic and the Federal Republic of Germany," *Penn State International Law Review*: Vol. 10: No. 1, Article 7.
Available at: <http://elibrary.law.psu.edu/psilr/vol10/iss1/7>

This Comment is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

Abortion Law Reform: The Nexus Between Abortion and the Role of Women in the German Democratic Republic and the Federal Republic of Germany

I. Introduction

The wave of rapid abortion law reform in the Western world in the second half of the twentieth century was generated by numerous factors and attitudinal modifications. In the 1950s society began to focus on reducing maternal mortality as well as on increasing reproductive choices.¹ Then, in the 1960s the attitudes of the "sexual revolution" and the invention of the contraceptive pill prompted men and women to reconsider traditional sex roles in society. In addition, world population growth became the focus of international organizations.² Another practical reason was the advent of more advanced medical technology. Technologically advanced procedures to monitor pregnancy now prevent potential danger to the life of the woman; thus, modern medicine eliminated the justification for abortion existing in the late nineteenth century abortion laws which allowed abortion to save the life of the mother.³

Another reason which the reform movement emphasized was the thalidomide scandal of the 1960s that resulted in the births of deformed babies after their mothers were refused abortions.⁴ Finally, the adoption of the English Reform Act in 1967 brought to light the problem of "abortion tourism." The reality that pregnant women would travel to foreign countries if necessary to obtain an abortion

1. J. JACOBSON, *THE GLOBAL POLITICS OF ABORTION* 7 (Worldwatch Paper No. 97, 1990). In addition, abortion was a social justice issue. When society began to discuss abortion more openly, it highlighted the relative accessibility of safe abortions to those who could afford appropriate medical care compared to those who were forced to resort to "back alley" abortions.

2. M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 11 (1987).

3. *Id.* at 11-12. Early abortion laws included indications to save the life of the mother in cases of tuberculosis and cardiovascular disease. Later, when fewer abortions were being performed to save the life of the mother, the medical profession was forced to change its justification for performing abortions; it decided to advocate liberalization.

4. *Id.* at 12. Thalidomide was never approved in the United States, but it was available in other countries. Articles about "thalidomide babies" born in England, Belgium, and West Germany appeared in periodicals; the information about the effect of the drug on the developing fetus heightened public awareness of the abortion issue.

prompted legislators and also women's groups to rally behind a liberalized view of abortion.⁵ In post-industrial modern societies such as the German Democratic Republic (GDR) and the Federal Republic of Germany (FRG), increased participation of women in the work force and higher levels of education and income of women coincided with abortion law reform to affect family size.⁶

The changing role of women in society and conflicting opinions of the legality and morality of abortion have brought abortion politics to the forefront of social issues.⁷ Liberal abortion laws, which assert that the rights of a pregnant woman to terminate her pregnancy are greater than the rights of the developing fetus, were passed in an attempt to decrease maternal mortality.⁸ The new abortion laws center on "indications," which are the circumstances under which a given law allows an abortion.⁹ However, controversy continues as many oppose abortion because it may be used as a birth control method. Proponents of liberal abortion laws argue that laws which emphasize public health and family planning would decrease the number of illegal, and often dangerous abortions which are performed.¹⁰ Generally, the abortion law of a given country will be dictated necessarily by the demands of society and by the status of women in society.¹¹

5. *Id.* at 12-13. After England passed its liberal abortion law in 1967, it experienced abortion tourism firsthand when women from other countries traveled there to acquire abortions.

6. J. JACOBSON, *supra* note 1, at 23. The change in the status of women in industrial societies also factors into the result of decreases in desired family size. As women seek to limit the number of children in their family, abortion plays a more substantial role, especially in countries where contraceptives are not readily available.

7. *Id.* at 46-48.

Debate on the morality of abortion perpetuated various myths concerning popular belief on the subject. One myth is that theological unanimity exists regarding the right of a woman to terminate her pregnancy. In fact, although the Roman Catholic Church equates embryonic life and the life of the mother and forbids abortion, Islamic law allows abortions through the fourth month of pregnancy. The Orthodox and Hasidic sects of Judaism forbid abortion, but the Reform and Conservative groups allow it. Another myth is that criminal laws will succeed in eliminating abortion. In reality, if legal abortions are not allowed, women will turn to illegal abortions, which are often life-threatening to the women. A final myth is that abortion is not the most effective method of birth control because it has the lowest failure rate. Also, in terms of ethics, abortion is accepted as a birth control method of last resort.

Id.

8. *Id.* at 7-8. In the most liberal laws, the right of a developing embryo is greater than the right of the woman to terminate the pregnancy at the point of viability, which is the age at which the fetus could live outside the womb.

9. *Id.* at 8-9. Different categories of indications are elements in various abortion laws. For example, countries allowing abortion for a social indication consider social factors such as low income, poor housing, and being a single woman. The existence of factors which adversely affect the health of the mother, such as a genetic defect of the fetus, rape, or incest may warrant a country to allow a woman to have an abortion.

10. *Id.* at 49.

11. *Id.* at 52. Increased employment of women and new family laws allowing women more access to resources prompt women to seek methods to limit their fertility. However,

On October 3, 1990, the GDR officially acceded to the FRG, thereby formally unifying after forty-five years of division and expanding the FRG into a state of seventy-eight million people and 137,900 square miles.¹² The ratification of a treaty of unification on September 20, 1990, made the Constitution of the FRG the law of all Germany. However, the concept of a unified Germany prompted historians to doubt the efficacy of merging two separate societies with different laws and ideologies.¹³

One important issue during treaty negotiations was abortion, since the GDR and the FRG maintained different policies and laws regarding the rights of pregnant women with respect to abortion.¹⁴ Reform of abortion law in Germany began in the late nineteenth and early twentieth centuries; however, the struggle to adopt and accept a single abortion law may continue in the newly unified Germany as it strives to combine the two former laws and form an appropriate compromise.

This Comment first will analyze abortion law reform in Germany from a historical and legal perspective to consider how women's role in society affected the abortion law. The starting point of the analysis is to examine abortion law in Germany from the law in the Prussian Penal Code to the law that existed at division in 1945. Then, the analysis continues with a discussion of the emphasis on women in the social policy of the German Democratic Republic (GDR), the creation of the GDR in 1945, and the liberalization of abortion law which was a component of the country's first social policy program. To compare the abortion law of the GDR with that of the FRG, this Comment will discuss the abortion law which continued in the Federal Republic of Germany (FRG) after division, the efforts of the abortion reform movement there, and the role of women in society in the FRG. Finally, the analysis is complete with an examination of the status of abortion law in unified Germany in 1990 and its effects on women from both the GDR and the FRG.

II. Early Reform of Abortion Law and the Role of Women in Germany

Historically, reform of abortion law in Germany, which began in the late nineteenth century and the early twentieth century, was

conflicting views of the roles of men and women in society complicate resolution of the abortion issue.

12. N.Y. Times, Oct. 3, 1990, at 1, col. 6.

13. N.Y. Times, Oct. 3, 1990, at 17, col. 1.

14. N.Y. Times, Aug. 26, 1990, at 9, col. 1.

affected by the pattern of the changes in the leadership of Germany.¹⁵ In 1851 the Prussian Penal Code (*Strafgesetzbuch*) provided a maximum penalty of five years in the penitentiary for abortions performed by oneself or by another.¹⁶ Other German states imposed lesser penalties; for example, Bavaria typically sentenced the women to four to eight years in the workhouse.¹⁷ However, in 1871 in Bismarck's Germany, the Penal Code for the German Reich also adopted the sentence of a maximum of five years in the penitentiary.¹⁸

In the beginning of the twentieth century, some Germans began to view that penalty as too harsh, and the Office of Justice, a penal law commission, drafted proposed lesser penalties.¹⁹ However, the collapse of the empire after World War I postponed decision on the abortion issue.²⁰ In 1922 Gustav Radbruch, the Minister of Justice of the Reichstag, and also a member of the Social Democratic Party, submitted a penal reform bill to lessen the penalty for committing an abortion; however, the draft was not passed in the Reichstag.²¹ The first success to the reformers arrived in 1926 when abortion was re-categorized as a misdemeanor, and the prison sentence was exacted upon only commercial abortionists.²²

Germany continued to reconsider the nature of abortion when the Supreme Court, in 1927, ruled that abortion was not punishable if danger to the life of the mother could not be avoided otherwise.²³ The development of the "medical indication" closely followed this decision in 1935; a new regulation permitted abortion in the case of direct danger to the life or health of the pregnant woman. This danger, however, was to be determined by certifying agencies consisting of physicians and public health officers.²⁴ In 1943 a new decree imposed the death penalty upon an abortionist if his or her actions "continuously infringe[d] upon the vital forces of the German peo-

15. N.Y. Times, *supra* note 13, at 17, col. 1.

Historians generally divide German history since the first unification by Otto von Bismarck in 1871 into four periods. Bismarck's Germany existed until after World War I, when the last emperor, William II, abdicated; the Weimar Republic was formed two days before Germany surrendered. Hitler, who came to power in 1933, expanded the borders of Germany, and the country under the Third Reich was larger than it was under Bismarck. After Germany was defeated in World War II, the Allies redrew the borders and divided Germany. Unification in 1990 commences a fifth period in German history.

Id.

16. BULLETIN 13 (Dr. Klaus Bloemer, ed. 1981) [hereinafter BULLETIN].

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 13.

ple." Two years later, when Germany was divided, that decree was declared null and void.²⁵ These initial changes set the stage for additional, more extensive reforms in the new Federal Republic of Germany.²⁶ By contrast, the abortion law reform movement was extinguished in the German Democratic Republic, and the two Germanies followed different paths regarding abortion as a reflection upon the differences in their societies.

Early abortion law reform in Germany occurred simultaneously with the commencement of the struggle for equal rights for women. This movement toward emancipation of women resulted from the increased gainful employment and financial independence of women, the growth of political democracy and a demand for equal rights for women, and two world wars which quickened the social changes.²⁷ This process began at the turn of the century, when female students were first admitted to study at German universities.²⁸ Freiburg and Heidelberg, two universities in southern Germany, were the first to admit women because Prussian ideology garnered less support in southern Germany than in other parts of the country, and because the Catholic Church realized that it would lose female members if it did not advocate higher education for women.²⁹ In 1906, 254 women were studying at German universities, but by 1914, the number had grown to 4,126.³⁰ Although some studied medicine, theology, and teaching, most women remained with art, sewing, cooking, and music.³¹

Because German women believed that the right to vote would be the catalyst for other necessary changes in laws, they began the women's suffrage movement, which the SDP formally recognized in 1911.³² Subsequently, the outbreak of World War I in 1914 forced

25. *Id.* at 14.

26. *Id.*

27. D. CHILDS & J. JOHNSON, *WEST GERMANY: POLITICS AND SOCIETY* 175 (1981). This early struggle for the emancipation of women in Germany was similar to events in other advanced nations [hereinafter CHILDS].

28. *Id.* at 176.

29. *Id.* at 175-76.

30. *Id.* at 176.

31. *Id.*

32. *Id.* at 176-77.

Before 1908, German suffragettes who marched in public demonstrations risked penalty under a law which prohibited women from participating in political activity. The Imperial Law on Association in 1908 then allowed women activists to demonstrate. The Social Democratic Party (SDP), which had wanted women to become members, created its first women's organization in 1872. In 1911, when the SDP formally approved the women's suffrage movement, the party held its first Women's Day. Other political groups followed the SDP and began to organize women. The Centre Party and the Catholic Church founded the Catholic Women's League in 1903. The National Liberals encouraged support of women, and the Alliance of Conservative Women was created in 1912.

Id.

women into the arms factories to do jobs which previously had been performed only by men.³³

Consequently, since more women were being employed, the trade unions and SDP combined their efforts to organize women workers, and to improve their working conditions. For example, laws concerning maternity leave were adopted beginning in 1927.³⁴ As a result of the changing status of women, the right of women to vote was finally declared in 1918 during political reforms after the collapse of the Kaiserreich.³⁵ The 1919 Constitution of the Weimar Republic asserted that men and women had equal civil rights and responsibilities.³⁶ However, the attitude of male domination which was born in militaristic Germany in the past persisted, and the rights included in the Weimar Constitution were largely theoretical and not practiced.³⁷ Furthermore, Hitler's Third Reich promoted the idea that manhood was supreme, and women in Germany lost any rights they may have acquired during the Weimar Republic. Hitler's emphasis on family and growth of the Aryan race forced women out of the workplace and the universities back into the home.³⁸ The Nazis encouraged women to become full-time housewives and mothers by offering marriage loans to women who promised to give up work outside the home.³⁹ However, the labor shortage caused by the war necessitated the gainful employment of women outside the home; protective laws that limited women at work were repealed in 1944 and 1945.⁴⁰

III. Women and Social Policy in the German Democratic Republic

After Germany was defeated in World War II, it was divided into three western zones occupied by Britain, France, and the United States and one eastern zone occupied by the Soviet Union. The GDR was officially founded on October 7, 1949, and East Berlin was

33. *Id.* at 177.

34. *Id.* at 178. Beginning in 1927, women were entitled to a maximum of twelve weeks of maternity leave, and they were guaranteed employment upon their return. Also, after returning to work, new mothers were allowed time to feed their babies.

35. H. SHAFFER, *WOMEN IN THE TWO GERMANIES: A COMPARATIVE STUDY OF A SOCIALIST AND A NON-SOCIALIST SOCIETY* 5 (1981).

36. *Id.*

37. *Id.* at 5-6. Throughout German history, women traditionally cared for the home and for the children, while men were the breadwinners and heads of household. These roles found permanence in German culture when men were portrayed as heroes, and as leaders in war and in peace.

38. *Id.* at 6. The ideal German woman, according to Nazi ideology, eagerly chooses to be a full-time wife and mother.

39. *Id.*

40. *Id.* After the war, the gainful employment of women was viewed as a patriotic duty. Labor shortages also hurt the economy of East Germany, and women there were also forced to work.

named the capital.⁴¹ The FRG, however, refused to legally recognize the GDR. The GDR entered the Warsaw Pact, and the FRG became a member of the North Atlantic Treaty Organization in 1955. These events completed the political division of Germany.⁴²

The Socialist Unity Party of Germany (SED), which dominated what was called a multiparty system in the GDR, proceeded to boost the economy of the GDR by declaring that building socialism was the "fundamental task" in the GDR.⁴³ Many people became dissatisfied with the system in the GDR, and by 1961, approximately three million people had moved to live in the FRG.⁴⁴ In an attempt to counteract this exodus, GDR politicians introduced pay increases and improved social benefits as incentives. The crystallized social policy in the GDR was the springboard for social benefits to women in the GDR which were not provided in the FRG.⁴⁵

This focus on women as a vital factor in the growth of the country commenced in the Constitution of the GDR. Article 20 stated that "men and women have equal rights and the same legal standing in all areas of social, state and personal life."⁴⁶ Equally as important, it declared that "advancement of women, especially in professional qualification, is a task for state and society."⁴⁷ The Constitution also emphasized that the state would protect the family and, in Article 38, that men and women are of "equal standing" regarding marriage and family.⁴⁸ Therefore, the policy of the GDR toward women and their contribution to and rights in a socialist society was firmly pronounced in the Constitution at the birth of the country.

The emancipation of women was a goal of the SED since 1946, when it was attempting to build the economy and social structure of the GDR.⁴⁹ In articulating the equality of women in its first constitution in 1949, the SED allowed women the right to work and the right to equal pay for equal work; consequently, women helped to

41. See H. KRISCH, *THE GERMAN DEMOCRATIC REPUBLIC: THE SEARCH FOR IDENTITY* 5-6 (1985).

42. M. McCauley, *THE GERMAN DEMOCRATIC REPUBLIC SINCE 1945*, at 74-75 (1983). Nikita Khrushchev of the United Socialist Soviet Republic (USSR) declared, in East Berlin in July, 1955, that the Soviet Union had accepted the division of Germany. In September, the USSR and the GDR entered into diplomatic relations, and the GDR thus became a sovereign state.

43. *CONTEMPORARY GERMANY: POLITICS AND CULTURE* 211 (C. Burdick, H. Jacobsen & W. Kudsus eds. 1984) [hereinafter *CONTEMPORARY GERMANY*].

44. *Id.* at 212. The GDR forced compliance with its social policy reforms by beginning construction of the Berlin Wall on August 13, 1961. This prevented East Germans from emigrating to the FRG and catalyzed the expansion of the economy of the GDR.

45. H. SHAFFER, *supra* note 35, at 161.

46. H. KRISCH, *supra* note 41, at 147.

47. *Id.*

48. *Id.*

49. M. DENNIS, *GERMAN DEMOCRATIC REPUBLIC POLITICS, ECONOMICS AND SOCIETY* 56 (1988).

abate the post-war labor shortage and boost the injured economy of the GDR.⁵⁰ During this period of development of the social policy, the emancipation of women was directly linked with their integration into the work force. Furthermore, the juridical equality of men and women ensured that the social policy would attempt to create equal rights in reality.⁵¹

After the war, when both skilled and unskilled labor were in demand, specialized personnel trained women who had never before worked outside the home. GDR health and administrative authorities and trade unions revised the official lists of occupations which previously had prevented women from working at certain jobs.⁵² Some machines were modified to allow women to work them; as a result, only occupations that were potentially injurious to women's health remained closed to women. However, a gender-specific division of labor continued to exist in industry, as simple assembly-line and feeding machine jobs were reserved for women.⁵³ In general, though, because of their contribution to the economy, working women, and women in general, grew into an important social group in the GDR—their gainful employment aiding in stabilizing the economy and fostering the growth of the country. Because the GDR recognized the role that women played in building the economy, it introduced measures to aid working mothers in its first social policy program in 1972.⁵⁴

During the 1960s when the GDR was formulating its goals for a successful social policy, the birth rate was declining. Factors which contributed to this decline were the increased employment of women, the increased burden on women to balance responsibilities of work and family without receiving help from husbands, the decline of religious belief, and the increasing economic independence of women which resulted from their gainful employment.⁵⁵ In 1969 the mortal-

50. DOLLING, *Culture and Gender*, in *THE QUALITY OF LIFE IN THE GERMANY DEMOCRATIC REPUBLIC CHANGES AND DEVELOPMENTS IN A STATE SOCIALIST SOCIETY* 31-32 (M. Rueschemeyer & C. Lemke eds. 1989). These constitutional principles were first introduced in August, 1946, by the commander-in-chief of the Soviet military administration for the Soviet occupation zone in his Order No. 253.

51. *Id.* at 32.

52. *Id.*

53. *Id.*

54. M. McCAULEY, *supra* note 42, at 178-79.

Social policy (*sozialpolitik*) addresses the development of society by examining income distribution, health, and welfare. The SED, until the mid-1960s, refused to use the word *sozialpolitik* because it was viewed as a mechanism for rectifying the problems created by capitalism, and because a socialist society did not need a social policy. However, the SED decided to formulate a social policy that would provide equality of opportunity to all citizens by satisfying basic needs, such as food, housing, health, and education. The most substantial element of the social policy under Honecker was housing.

Id.

55. *Id.* at 180-81.

ity rate in the GDR exceeded the birth rate.⁵⁶ To counteract the declining birth rate, the GDR introduced, as a part of its first social policy program in 1972, a pro-natal policy which attempted to improve the lot of working mothers.⁵⁷

The new laws, which were intended to encourage women to contribute to the economic growth of the country through the work force but without neglecting their families, increased prenatal and postnatal maternity leave from eighteen to twenty-six weeks.⁵⁸ In addition, on the birth of each child, the mother received one thousand marks. The new laws also provided twenty-one days off to working mothers with three children; in 1977 this leave policy was extended to include working mothers with two children. In addition, full-time working mothers who had children under eighteen years of age received one day off per month for housework. The law also allowed one day off per month for women over forty and for single fathers. Finally, working mothers with children under six years of age were not required to do shiftwork or work overtime.⁵⁹

In 1975 to further encourage women to work outside the home as they raise a family, the GDR introduced the "baby year," which allowed the new mother, beginning with her second child, to take a year's leave of absence from work at a pay equal to 65% to 90% of her average net earnings. Women were guaranteed the right to return to the same job without any loss of social benefits. Their salary was guaranteed from the end of the postnatal leave until the child was one year old.⁶⁰

Then, beginning on May 1, 1986, the government extended the baby year benefits to working women on the birth of their first child. The new policy also provided paid leave for working mothers to care for their sick children.⁶¹ Finally, in May 1987 the authorities increased the monthly child benefit from twenty to fifty marks for the first child, from twenty to one hundred marks for the second child, and from one hundred to one hundred fifty marks for the third child.⁶² This affirmative governmental support and guidance for the family was consistent with the goal of the SED of increasing the economic participation of women in society while also expanding the population. In addition, the increased benefits emphasized that the SED realized the essential role of the family in bringing up children

56. M. DENNIS, *supra* note 49, at 44.

57. M. McCAULEY, *supra* note 42, at 180.

58. H. KRISCH, *supra* note 41, at 147.

59. M. McCAULEY, *supra* note 42, at 180.

60. See M. DENNIS, *supra* note 49, at 65.

61. *Id.*

62. *Id.*

in a socialist society.⁶³

The GDR made a conscious effort to eliminate discrimination against women by passing legislation for the furtherance of women. This was, in effect, reverse discrimination; that is, the laws specifically allowed discrimination in favor of women, and especially mothers, in order to obliterate any trace of existing discrimination against them.⁶⁴ This process began in 1950, when the Law on Protection of Mothers and Children and the Rights of Women made businesses responsible for the furtherance of women's education and the promotion of women to higher positions.⁶⁵ Furthermore, in 1961 a chapter in the Code on Labor Laws, "Furtherance of the Gainfully Employed Woman and the Problems of the Working Woman," discussed the equal rights of women in a socialist society and placed responsibility for the realization of these equal rights on the state authorities and on business leaders.⁶⁶ This trend continued throughout the 1960s and the early 1970s, as resolutions, ordinances, and laws regarding the education and training of women, the development of women in politics, and the aid of working mothers were introduced.⁶⁷ The fundamental concept of the furtherance of women which was emphasized in the GDR was born of socialist ideology; no analogous measures were passed in the FRG, and consequently women in the FRG did not enjoy the same benefits which arose from the laws.

Even though the GDR declared the existence of equality of the sexes, the developed socialist mechanism in the GDR favored the male. Some reasons for this actual discrimination were traditional prejudice against full-time career women, a shortage of qualified women for responsible positions (due to lack of adequate training),

63. *Id.*

64. H. SHAFFER, *supra* note 35, at 20.

65. *Id.*

66. *GBL* I, April 12, 1961, § 123-133, at 27, cited in § 123.

67. *Id.*

In 1962, the GDR introduced the "Resolution on the Tasks of State Organs for the Furtherance of Women and Girls According to the Mandate of the Politburo of the SED Central Committee of Dec. 23, 1961." In 1966 and 1967, the government focused on education with the "Ordinance for the Education and Training of Women for Technical Professions and their Preparation for Appointments to Leading Positions" and the "Ordinance for the Education of Women in Special Classes in Vocational School of the GDR," which mandated that employers of working housewives who wanted to pursue higher education give the women twenty hours per week off from work with pay. Then, the 1968 "Resolution of the Council of Ministers on the Basic Policies and Measures for the Development and the Appointment of Women to Leading Positions in Political and Economic Life" concentrated on increasing the involvement of women in public life. The "Ordinance on the Furtherance of Female Students with one or more Children and of Expectant Mothers Studying at Institutions of Higher Learning and at Vocational Schools" and the "Ordinance on the Furtherance of and Financial Aid for Mothers who are Apprentices" of 1972 aided working mothers.

Id.

and the heavy burden of juggling work, children, and the home.⁶⁸ However, because women in the GDR received numerous benefits under the specific social policy of the state, they were officially recognized as an integral component of society.

IV. Liberalization of Abortion Law in the German Democratic Republic

Reform of abortion law in the GDR occurred more quickly than in the FRG. The result of this reform in the GDR was one of the most liberal abortion laws in the world. A possible reason for the rapid reform in the GDR was that, immediately after the Germanies divided, the equal rights of women were recognized in the Constitution.⁶⁹ In the 1950 Law for the Protection of Mother and Child and Rights of the Woman, the GDR replaced the existing abortion law with the "indications solution."⁷⁰ The law allowed a legal abortion for a medical, ethical, or social indication. An ethical indication existed if the pregnancy had resulted from rape or incest. A typical social indication existed if the potential parents would not have been able to care for the child. The social indication requirement was liberally construed, and it was not difficult to prove.

However, advocates of a more liberal law stressed that proving a social indication to the committee of physicians and social workers was degrading and unfair to the pregnant women seeking an abortion. They also declared that because this process was unduly long and complicated, the time for a safe abortion may have passed in many cases before the indication was accepted.⁷¹ In reaction to this phenomenon, many pregnant women, rather than attempting to explain their actions to the authorities in the GDR, instead resorted to dangerous illegal abortions. By 1971 illegal abortions caused more than 30% of the maternal mortality which occurred in the GDR.⁷²

In reaction to the increased rate of maternal mortality, the GDR passed the Law on the Interruption of Pregnancy in March 1972.⁷³ The new law, which did not employ the earlier indications solution, allowed all abortions during the first twelve weeks of pregnancy. The only two limitations in the law were that a woman would be allowed only one abortion during any given six-month period, and

68. M. McCauley, *supra* note 42, at 133.

69. See J. Jacobson, *supra* note 1, at 25.

70. H. Shaffer, *supra* note 35, at 50.

71. *Id.* Another reason that critics cited for eliminating the requirement of speaking to a committee was that the pregnant women may have been too shy to explain the details of their situation to strangers.

72. *Id.* at 50.

73. M. Dennis, *supra* note 49, at 96. In the People's Chamber, fourteen deputies of the Christian Democratic Union (CDU) voted against the law, and eight abstained. This bill was the only one at that time which was not approved unanimously.

that an abortion would not be allowed if a physician advised that it would endanger the life of the mother. Under the law, a woman who had an abortion received regular sick pay for her absence from work. In this respect, abortions were treated as any other medical procedure with regard to insurance, as the woman was not required to pay for the procedure. This law, in an effort to eliminate the need for abortions, also mandated that contraceptives be provided without cost to women covered by social security.⁷⁴

The liberal abortion law of the GDR seems to contradict the social policy of encouraging population growth as well as specific pro-natal measures such as the "baby year." The justification for giving women the right to choose whether and when to have children lies in GDR ideology. The legal equality of women had been articulated in the Constitution, and communism recognized the right of each woman to have control over her own body.⁷⁵ The government justified the law by stating that its primary goal was to decrease maternal mortality by eliminating the demand for illegal abortions.⁷⁶

Eliminating "abortion tourism" was another reason for passing the law. Beginning in 1972 the GDR allowed free travel (without a visa) to Czechoslovakia and Poland where abortion was legal. Thus, German women would be able to travel easily to these countries to obtain an abortion. By liberalizing its own abortion law, the GDR eliminated the incentive to travel to other countries and encouraged its citizens to remain in the GDR to have the procedure performed.⁷⁷

V. Abortion Law Reform in the Federal Republic of Germany

After division in 1945, the Federal Republic of Germany eliminated all vestiges of Nazi ideology from its abortion law by repealing parts of the "law on genetic health," which had been implemented in 1943. Then, abortion law reform reverted to its pre-World War II position in Germany.⁷⁸ Within the next few years, the Parliamentary Council debated whether to add the concept of "protection of embryonic life" to the new Constitution.⁷⁹ In 1953 when the 1871 Penal Code was revised, the penalty for abortion was not altered. However, the 1935 "law on genetic health" was still valid in part, so abortions were allowed if a "medical indication" existed.

As an integral component of the major reform of the Penal Code in 1960, new indications for abortion were proposed to Parliament by the Minister of Justice, who was a member of the Christian

74. *Gesetz ueber die Unterbrechung der Schwangerschaft*, at 89.

75. *Familienpolitik*, at 34-35.

76. *Ehe und Familie*, at 34.

77. *Id.*

78. BULLETIN, *supra* note 16, at 14.

79. *Id.*

Social Union. The suggested "ethical" or "criminological" indications permitted abortion without penalty if the pregnancy resulted from rape or other sexual offenses. However, in 1962 the draft proposed by the federal government did not refer to these other indications. Neither draft became law in 1965.⁸⁰ In 1969 the final reform of the Penal Code was completed; it reclassified abortion from a crime to a misdemeanor. Also, it refused to increase the penalty in "an especially serious case."⁸¹ This mitigation of the penalty was a tentative step toward liberalization of abortion law.

The reform of abortion law intensified as political parties and other groups voiced their dissatisfaction with the new abortion law in the reformed Penal Code. In early 1970 a group of German and Swiss criminal law professors, who were dubbed the "alternative professors," submitted two possibilities for reform of the abortion law, section 218.⁸² The majority of this group asserted that any abortion performed in the first four weeks of pregnancy, or an abortion performed by a doctor after the pregnant woman was counseled, in the second or third month of pregnancy, should not be punished. Also, the majority would have allowed abortions after the third month if there were danger to the life or health of the woman or anticipated mental or physical harm to the baby.

The minority agreed with the majority that abortions in the first four weeks should not be punished; thereafter, however, the minority would allow an abortion only if the pregnancy could not reasonably be demanded (especially if danger to the life or health of the pregnant woman were involved), if the pregnant woman were under sixteen years of age, if the birth would disrupt caring for other children, if the pregnancy were caused by rape, or if there were a probability that the child would be mentally or physically impaired.⁸³

These two proposals were broad because they included medical, ethical (criminological), pediatric (eugenic), and emergency indications. The majority emphasized that the woman and her doctor should make the final decision; however, the minority placed this burden on a certifying agency. These two positions delineated the path of future reform in Germany.

Opinions on the legality of abortion differed across both religious denominations and political parties. In 1970 the Conference of German Catholic Bishops argued that abortion was the taking of a

80. *Id.*

81. *Id.*

82. *Id.* at 15. Section 218 is the abortion law in the German Penal Code.

83. *Id.* at 15.

life and was thus punishable.⁸⁴ However, the next year, the Central Committee of German Catholics stated that it approved of abortions on certain specific grounds. Then, the party congress of the Social Democrats argued in favor of abortion on demand within the first three months. In early 1972 the federal government proposed that abortion should not be punishable if two physicians agreed that a medical, ethical, eugenic, or emergency indication existed. Both the Conference of German Catholic Bishops and the Council of the Protestant Church in Germany argued that the Government's position was too broad.

In March 1973 the Social Democratic Party (SDP) and the Free Democratic Party (FDP) together submitted four motions to the Bundestag. These organizations wanted section 218 to allow abortion on demand within the first three months; this coalition also focused on improved services by the public health system, proposing that the system provide medical consultation on contraception, medical attention for a legal abortion, and family counseling.⁸⁵ In response to these suggestions, the Christian Democratic Party (CDU/CSU) submitted its own bill to the Bundestag. This bill specified that abortion should be allowed only if a medical or ethical indication existed.⁸⁶ The Conference of German Catholic Bishops and the Council of the Evangelical Church in Germany still refused to accept abortion on demand within the first three months and agreed that abortion should be allowed only when the life or health of the pregnant woman was in danger.⁸⁷ As a perpetual point of contention among various organizations, the abortion disagreement fueled further reform of section 218.

On June 18, 1974, a new abortion law, which allowed abortion without punishment within the first three months, was implemented.⁸⁸ However, three days later, members of the CDU/CSU Bundestag party entered a complaint in the Federal Constitutional Court.⁸⁹ They asserted that the three month provision violated the Constitution (the Basic Law). Pending a decision, the Court held that the contested part of the law could not be enforced.⁹⁰ The remainder of the law, which allowed abortion after three months if a medical or eugenic indication existed, went into effect on June 22. Also, the law allowed abortion at any time if an ethical indication

84. *Id.*

85. *Id.* at 16.

86. *Id.*

87. *Id.* at 17.

88. *Id.*

89. Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts*), 39 BVerfGE 1 (1975).

90. *Id.*

existed.

The CDU/CSU party challenged the law under Article 2(2) of the Constitution, which states that "everyone has the right to life and to the inviolability of his person."⁹¹ The Court held that Article 2(2)[1] protects the developing life as a separate legal interest, and that the state has an obligation to protect all human life. The Court therefore struck down the three month time limitation as unconstitutional but upheld the parts of the statute which allowed abortion for medical indications within the first twenty-two weeks of pregnancy, and abortion for eugenic or ethical indications within the first twelve weeks. Also, the Court decided to allow abortion in cases of extreme social hardship.⁹²

In October 1975 the political parties submitted further drafts of a proposed abortion law to the Bundestag. The SDP and FDP parties would allow abortion performed by a doctor if a medical, ethical, eugenic, or emergency indication were present and if the pregnant woman sought social and medical consultation. The CDU/CSU party, however, proposed a draft with grounds more narrowly drawn than those in the SDP and FDP bill. The CDU/CSU draft proposed that the determination of the grounds should be left to special consultative and certifying agencies or authorized physicians.⁹³ In December, the public health system was expanded to provide consultation about contraception and medical help with legal abortions. On February 12, 1976, the Bundestag passed the SDP and FDP bill.⁹⁴ Finally, on June 21, 1976, the reformed abortion law in the fifteenth amendment to the Penal Code went into effect.⁹⁵

91. *Id.*

92. *Id.* The Court also noted that the state had a duty to offer counseling and assistance to the pregnant woman. Specifically, the state should inform her of her fundamental duty to consider the right to life of the unborn and encourage her to continue her pregnancy.

93. BULLETIN, *supra* note 16, at 18.

94. *Id.*

95. *Id.* at 18. The text of section 218 is as follows:

Section 218 Termination of pregnancy

(1) Whosoever commits an abortion will be subject to a sentence of up to three years' imprisonment or a fine.

(2) In especially grave cases the penalty is from six months to five years imprisonment. An especially grave case is usually indicated if the perpetrator

1. acts against the will of the pregnant person or
2. negligently creates a risk of the death or severe damage to the health of the pregnant person.

(3) If the pregnant person commits the act, the penalty is up to one year's imprisonment or a fine. The pregnant person is not punishable according to paragraph 1 above if the abortion was performed by a doctor after consultation (section 218(b), paragraph 1, subsections 1, 2) and not more than twenty-two weeks have passed since conception. The court can refrain from punishment of a pregnant person under paragraph 1 above if she was under particular duress at the time of the operation.

(4) An attempted abortion is punishable. A pregnant woman will not be punished because of such attempts.

After the 1976 reform of section 218, the government of the FRG appointed a commission of independent experts to study and examine the effects of the bill on the country. The Ministry for Youth, Family Affairs and Health published the conclusions of the

Section 218(a) Permissible grounds for abortion:

(1) Abortion by a doctor is not punishable under section 218 if

1. the pregnant person agrees and
2. the termination of pregnancy, according to medical knowledge, is indicated with regard to the current and future living conditions of the pregnant person, in order to avoid a danger to the life or a danger of a serious impairment of the bodily or mental health of the pregnant person, and if this danger cannot be avoided in any other reasonable way.

(2) The conditions of paragraph 1(2) are considered to have been fulfilled if according to medical knowledge

1. pressing reasons exist for the assumption that the child, as the result of a genetic condition or damaging influences before the birth, would suffer from non-remediable damage to its state of health of so severe a nature that the pregnant person cannot be expected to continue the pregnancy.
2. an illegal act has been perpetrated on the pregnant person as defined under sections 176 to 179 and pressing reasons for the assumption that the pregnancy stems from this act or
3. an abortion otherwise is indicated to protect the pregnant person from the danger of an emergency situation that

(a) is so severe that continuation of the pregnancy cannot be demanded of the pregnant person and

(b) cannot be averted in any other reasonable way.

(3) In the cases under paragraph 2(1) not more than twenty-two weeks may have passed since conception; in the cases under paragraphs 2 and 3 not more than twelve weeks.

Section 218(b) Abortion without counseling the pregnant person

(1) Whosoever interrupts a pregnancy without the following circumstances taking place:

1. The pregnant person at least three days before the operation has talked with a counselor about the question of an abortion (paragraph 2), and in that connection was advised about the available public and private help for pregnant persons, mothers and children, especially about those aids that facilitate the continuation of the pregnancy and the situation of the mother and child, and
2. has been advised by a doctor about the medically significant aspects will be punished with imprisonment of up to a year or with a fine, if the deed is not made subject to punishment under section 218. The pregnant person is not punishable under sentence 1.

(2) Counselor in the sense of paragraph 1(1) is

1. a counseling centre recognized by a state agency or public corporation, institution or foundation under public law or

2. a doctor who does not himself perform the abortion and

(a) as a member of a recognized counseling centre (no. 1) is familiar with the counseling function in the sense of paragraph 1(1),

(b) is recognized as a counselor by a state agency or public corporation, institution or foundation under public law or

(c) has informed himself through consultation with a member of a recognized counseling centre (no. 1), which is familiar with the counseling procedure in the sense of paragraph 1(1); or through consultation with a social agency or with the help of another suitable method available in an individual case.

(3) Paragraph 1(1) is not applicable if the abortion is indicated in order to prevent the pregnant person from bodily illness or physically indicated danger to her life or health.

Commission on January 1, 1980.⁹⁶ The Commission found that more than two-thirds of the citizens of the FRG were against potential future restrictions on access to abortion. As before, during the long process of reform of the abortion law, the influence of religious denomination and political party affiliation were factors in formulating an opinion of the law. However, the Commission discovered that 40% of Roman Catholics in the FRG favored abortion on demand, regardless of the stance of the Catholic Church on abortion. Also, among the political parties, 43% of CDU/CSU voters, 46% of SDP voters, and 48% of FDP voters wanted a more liberal law.⁹⁷ Finally, the Commission concluded that 50% of women of child-bearing age and 41% of men favored a broader law.

The Commission recommended that the government formulate a comprehensive publicity campaign aimed at increasing public knowledge of family planning, pregnancy prevention, and abortion. It also noted that schools should give students more information about contraceptive methods. When the new law was first passed in 1976, the government had published accompanying pamphlets to inform the public of the ramifications of the law and also to garner public support for the measure.⁹⁸ After the findings of the Commission were published, the government issued a statement further explaining the initial intent of abolishing the threat of punishment for abortion. The goals of the amendment were to provide aid and advice to women who needed them, reduce the number of dangerous illegal abortions, improve protection of the unborn child, and increase awareness of family planning methods in order to prevent unwanted pregnancies.⁹⁹ The government stated that the amendment would allow a pregnant woman to explain her situation to the authorities without the fear of penalty. After enactment of the amendment, the government was pleased that the number of illegal abortions had in fact been reduced; therefore, the law protected the lives and health of German women.¹⁰⁰

96. BULLETIN, *supra* note 16, at 2.

97. *Id.*

98. H. SHAFFER, *supra* note 35, at 52.

The federal government published and distributed such pamphlets as *Before the Decision Comes the Consultation: The Reform of § 218 of the Penal Code, Every Child has a Right to be Wanted, Every Expectant Mother has a Right to Assistance, and Use of Contraceptives is Preferable to Abortion*. Although the pamphlets addressed abortion, under the new law, no contraceptives were provided free by the government, except for needy mothers covered by the social insurance program.

Id.

99. BULLETIN, *supra* note 16, at 6.

100. *Id.*

VI. The Role of Women in Society in the Federal Republic of Germany

At the time of division, the increasing demands for reform of section 218 corresponded with the expanding role of women in society. After 1945 German women were incident to the rebuilding of the post-war economy. Because most of the 5.8 million German citizens who died in the war were men, women had a lower chance of marriage, and they went to work in an effort to become self-sufficient.¹⁰¹ Also, working women were essential to commerce and industry after the war to prevent the factory output from decreasing as a result of fewer workers. In fact, the number of employed women steadily increased; in 1962 women comprised over one-third of the labor force.¹⁰² This growth continued in the next decade, and in 1977, 37.7 percent of the labor force were women.¹⁰³ As in the post-war 1940s, women continued to work in agriculture and in the textile industry. However, women also progressed in insurance and banking, even though women typically held only routine positions among white-collar employees.

With the increased number of women in the work force came increased, though not yet equal, wages for women. In 1949 women earned only half of what men earned for equivalent work.¹⁰⁴ From 1960 to the mid-1970s, the difference decreased from 40% to 34% for women working in the private sector. In 1976 hourly wages of female industrial workers were 28.6% lower than that of male industrial workers.¹⁰⁵ Before the West Germany of the mid-1950s, there existed special "women wage categories" (*Frauenlohngruppen*) which specified discriminatorily low wages for women.¹⁰⁶ These were not abolished until the German courts held that the equal rights clause of the Constitution applied to the workplace and should be interpreted to require equal wages for equal work. However, new "light wage categories" (*Leichtlohngruppen*) that specified low wages for simple jobs which did not require much physical exertion were introduced. Although these categories theoretically applied to both male and female workers, in actuality almost all the workers in these categories were women.¹⁰⁷

Therefore, the mandate of the Constitution remained largely

101. CHILDS, *supra* note 27, at 181. After World War II, both Germanies suffered through weakened economies and labor shortages. Women in both countries helped to abate the economic problems by working outside the home.

102. *Id.*

103. *Id.* at 182. In 1977, 10,159,000 of the 26,952,000 full-time workers in the FRG were women.

104. H. SHAFFER, *supra* note 35, at 96.

105. *Zwischenbericht*, at 45.

106. *Id.* at 99.

107. *Id.*

theoretical, and women did not enjoy the same rights as men in the workplace. The status of female workers in the GDR was much different, since there the gainful employment of women was, according to socialist ideology, a considerable factor in the social emancipation of women.¹⁰⁸ In the GDR, society accepted working women and working mothers; however, in the FRG, the concept of the participation of women in society did not translate into the gainful employment of women.

In contrast to that of the GDR, the government of the FRG did not expressly favor women or provide ample benefits for working mothers. The difference in the role of women in the two societies lies in the underlying ideology of the GDR. In the GDR, women enjoyed a higher status in society than women in the FRG because the socialist policy in the GDR emphasized strengthening the role of women in society through legislation intended to prevent discrimination against women and to encourage women to raise a family while continuing to build the economy by working outside the home. The FRG, on the other hand, since it did not build its society on socialist principles, did not have an analogous social policy. Therefore, women in the FRG continued in the same role which they had played before division. That is, the women continued to care for the house and children full-time, and the men continued in the traditional role of the breadwinner in each household.

Numerous women's organizations which discuss issues relevant to women in society have attempted to effect changes in the status of women in the FRG.¹⁰⁹ Groups open to women in general, religious women's organizations, professional women's organizations, women's groups which are branches of political parties, and radical "feminist" women's groups, although they have not been overwhelmingly successful in increasing awareness of women's problems, have begun to participate on the legislative level in formulating and implementing new policies concerning the emancipation of women.¹¹⁰

There was no analogous women's movement in the GDR, since the only women's organization there was the Democratic Women's League of Germany (DFD), which was started in 1947.¹¹¹ Most of the women who served in the administration of the DFD were SED members. After the mid-1960s, the DFD served only as a social club for nonworking mothers, since after the social policy of the GDR

108. CONTEMPORARY GERMANY, *supra* note 43, at 225.

109. H. SHAFFER, *supra* note 35, at 153.

110. *Id.* at 159.

111. *Id.* at 158. Initially, the DFD aimed to foster political and ideological pursuits among women, draw women from all levels of the population into the organization, encourage women to work outside the home, and ease the burden of working mothers. However, since the mid-1960s, the DFD had begun to focus on nonworking women.

that favored working women was implemented, the interests of those women were represented by that policy. Then, women did not need the support of a women's organization.¹¹²

VII. Abortion in Reunified Germany

In August and September 1990 during treaty negotiations between East and West German officials, abortion was at the epicenter of a dispute which threatened the proposed reunification schedule.¹¹³ As in the FRG during the reform of section 218, the issue proved to be highly political before the treaty was ratified. The Social Democratic Party (SDP) threatened to interrupt the negotiations if the FRG did not liberalize its law when the two countries reunited. The SDP favored allowing women from the FRG to travel freely to what was the GDR to have abortions, since, under the former law of the GDR, abortions were available on demand there.

On August 21 the Bonn Government proposed that, during a transitional period of two years following reunification, the existing FRG and GDR abortion laws continue to exist without alteration. However, that proposal also would have permitted only women living in what was then the GDR to have abortions; that is, women from the FRG would commit a crime by traveling to the GDR to have an abortion.¹¹⁴

The dispute, which was the last issue resolved in the treaty, was finally decided at midnight on August 31. The authorities compromised to allow the existing GDR law to remain in effect for two years, and to permit women who live in what was the FRG to travel to the former GDR to have an abortion without penalty.¹¹⁵ In effect, the final decision in the treaty delays the dispute over the legality of abortion for two years.

VIII. Conclusion

After the two-year post-reunification period has ended, the German government will face the task of reconciling the conflicting abortion laws of the FRG and the GDR. To reconcile the differing laws, one must examine the reasons for the development of each law in terms of the societal factors which influenced it.

In the GDR, socialist ideology emphasized that women could become emancipated through their employment outside the home. Also, the Constitution of the GDR asserted that equality between the sexes was an integral part of GDR society. The GDR attempted

112. *Id.* at 159.

113. N.Y. Times, *supra* note 14, at 9, col. 1.

114. *Id.*

115. N.Y. Times, Sept. 1, 1990, at 3, cols. 1-2.

to realize this theoretical equality by passing legislation directly aimed at the furtherance of women, and by placing women at the nucleus of social policy with laws which benefit working mothers. The legalization of abortion in 1972 was part of the first social policy program in the GDR. Abortion law was thus created and altered by the socialist ideology; the right of women to obtain an abortion was a right recognized through reliance on socialism in the GDR.

In the FRG, however, the abortion law reform movement extended its previous efforts after division and after the Nazi laws had been repealed. The reform followed the increasingly powerful women's movement, and the changes reflected the more substantial role of women in the workplace. Although most women in the GDR worked outside the home, women in the FRG remained at home to become full-time wives and mothers more often than those in the GDR. This difference is a factor in the conflicting laws which affect women in the two Germanies. In particular, the abortion laws were dissimilar because the underlying principles of each of the societies did not overlap. Because socialism provided the mechanism for the equality of women, women in the GDR enjoyed more individual rights regarding abortion than women in the FRG. However, in the FRG, without the support of socialist ideology, reform of section 218 was an exhausting process. In unified Germany, the government must endeavor to reconcile the conflicting laws to determine an acceptable and enduring compromise.

Elizabeth J. Kapo

